Supreme Court, U.S.
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No. 09-

IN THE

SUPREME COURT OF THE UNITED STATES

DHRUBA PRADHAN,
Petitioner,

vs.

ERIC H. HOLDER, JR.,
Respondent

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LEE HARWELL, JR.
LAW OFFICE OF LEE HARWELL, JR.
3424 Carson Street, Suite 320
Torrance, California 90503
Telephone: (310) 542-9710
Facsimile: (310) 542-9850
Email: leehar@earthlink.net

Counsel for Petitioner Dhruba Pradhan

QUESTIONS PRESENTED FOR REVIEW

I. Whether the finding of likely safe relocation was based on substantial evidence sufficient to support the denial of Withholding of Removal under INA section 241(b) and the requested relief under the Convention Against Torture.

II. Whether the court evidence of past persecution creates the presumption that future persecution will occur.

III. Whether government's burden of proving safe relocation has been met.

IV. Whether the fact that Mr. Pradhan's father has lived in Katmandu without persecution since giving a 50,000 Rupie bribe to the Maoist terrorists to avoid persecution in November 1998 can be used as evidence that Pradhan will not be persecuted if sent back to Nepal.

V. Whether the fact that Maoists operate in Katmandu precludes a finding that Katmandu would be a safe relocation location.

VI. Whether the fact that a replacement passport was obtained is evidence of a lack of likelihood of persecution.

VII. Whether passage of time is evidence of lack of likelihood of future persecution.

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INTRODUCTORY STATEMENT

Dhruba Pradhan, a citizen of Nepal, applied for Asylum, Withholding of Removal and Relief under the Convention Against Torture. The Ninth Circuit found that the Asylum Application was barred because it was not filed timely. The Ninth Circuit agreed that the IJ found that Pradhan had been persecuted by the Nepalese police and the Maoist terrorists in Nepal in the past. (Decision, p. a-4, Citation is the United States Court of Appeals for the Ninth Circuit Decision attached to the Appendix below.)

The Ninth Circuit also held that the additional finding by the IJ and the BIA that the IJ's determination that (1) changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could avoid future threat to his life or freedom by relocating to Katmandu with the rest of his family. (Decision p. a-5.) The facts used to support the a return to Katmandu would not create a threat were that Pradham obtained a replacement passport in 2002 (Decision, p. a-5) the family has relocated to Katmandu and no member of his family has been arrested or harmed since Pradham left Nepal. (Id.)

Since there was a finding that a safe relocation location existed the Application for Withholding of Removal and request for relief under the Convention Against Torture were denied.

1. STATEMENT OF JURISDICTION

Petitioner, Dhruba Pradhan (hereinafter "Mr. Pradhan" or "petitioner"), seeks review of the Ninth Circuit Decision to affirm the removal order from the Board of Immigration Appeals (hereinafter "Board" or "BIA"). The Board had jurisdiction, pursuant to 8 C.F.R. §§ 1003.1 (b)(2) and 1242.21, to review the decision of the Immigration Judge (hereinafter "IJ") ordering Mr. Pradhan's removal, and denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture Act (hereinafter "CAT") in lieu of removal.

The Court of Appeal had jurisdiction over the matter pursuant to Section 242 of the Immigration and Nationality Act (hereinafter "INA" or "Act") 8 U.S.C. § 1252(a)(1).

The Court of Appeal decision was filed November 9, 2009. Under United States Supreme Court Rule 13 the Petition for Writ of Certiorari is timely if filed within 90 days. However, since that would have been Sunday February 7, 2010 the filing is timely filed or mailed by Monday February 8, 2010.

2. STATEMENT OF ISSUES

The finding of likely safe relocation was error. The Ninth Circuit held that the evidence that his father and family had not been persecuted since their move to Katmandu was evidence that Mr. Pradhan's relocation to Katmandu was likely to be safe. As a result the Withholding of Removal and CAT were denied. The error is in the evidence and the burden of

proof used in finding a likely safe relocation.

As the Ninth Circuit stated, to demonstrate eligibility for withholding of removal, Pradhan must prove it is "more likely than not" that his life will be threatened in Nepal because of his "race, religion, membership in a particular social group, or political opinion. (Decision, p. a-4, citing *Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001); 8 USC section 1231(b)(3).)

However, not mentioned was the fact that once evidence sufficient to show that it is more likely than not that past persecution occurred, the burden switched to the government to prove that matters have changed for the better.

The Ninth Circuit admitted that the IJ found that Pradhan had been persecuted by the Nepalese police and the Maoist terrorists in Nepal in the past. (Decision, p. a-4.)

However, the Ninth Circuit also held that the additional finding by the IJ and the BIA that the IJ's determination that (1) changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could avoid future threat to his life or freedom by relocating to Katmandu with the rest of his family. (Decision p. a-5.) The facts used to support the a return to Katmandu would not create a threat were that Pradham obtained a replacement passport in 2002 (Decision, p. a-5) the family has relocated to Katmandu and no member of his family has been

arrested or harmed since Pradham left Nepal. (Id.)

This ignores six problems. First, evidence of past persecution creates the presumption that future persecution will occur. Second, it ignores the government's true burden of proving safe relocation. Third, it ignores the fact that Maoists operate in Katmandu. Fourth, it ignores that fact that Mr. Pradhan's father gave a 50,000 Rupie bribe to the Maoist terrorists to avoid persecution in November 1998. Fifth, it improperly uses the fact that a replacement passport was obtained as evidence of a lack of likelihood of persecution. Sixth, it improperly uses passage of time as evidence of lack of likelihood of future persecution.

These six problems are ignored. When they are considered, there remains no substantial evidence to support a finding of safe relocation.

3. STATEMENT OF FACTS

At the time of his individual hearing with the IJ, the petitioner was a 23 year old native and citizen of Nepal. He testified that he and his family have been harassed by both the police and Maoist terrorists in Nepal. [AR 51]. He testified that the Maoists attacked his family on four occasions and subsequently destroyed their family owned furniture factory in 1999. [AR 151]. The factory was destroyed due to the blasting of four bombs. [AR 51].

The petitioner testified that the police first arrested him on October 1998. [AR 134]. The arrest

occurred at petitioner's farmhouse during the Dasra festival, which is one of the biggest festivals in Nepal. [AR 134]. His father and brother were also arrested. [AR 134]. The police took them to the police station and were told they were arrested for supporting the Maoists. [AR 135]. The police accused them of providing the Maoists an office space in their home. [AR 135]. They then beat the petitioner with boots. [AR 136]. Petitioner's brother was released after 4-5 hours of detention. The petitioner and his father, however, were held for two days and then released. [AR 136].

The petitioner testified that prior to the arrest, his family farm was taken over by Maoists. [AR 137]. He informed the police about these actions, but the police accused him of voluntarily giving the Maoists his farm. [AR 137].

On November 30, 1998, five Maoist terrorist, dressed in green fatigues and wearing guns, visited petitioner's home. [AR 138]. They demanded overnight lodging and donations for their cause. [AR 138]. Fearing for their lives, the petitioner and his family provided the terrorists lodging and food. The petitioner's father was also forced to give them 50,000 rupes. [AR 138].

The petitioner and his family reported this incident to the village development committee. The police were also informed, but did not take any material action. [AR 139].

On December 24, 1998, eight Maoist terrorists

with guns again appeared at petitioner's home. They told petitioner's father that they wanted to recruit his sons into their army. [AR 140]. They also demanded that petitioner's family provide them with a gun. [AR 140]. The petitioner refused and was beaten. The terrorists left exclaiming that they would return later. [AR 141].

On January 5, 1999, about 40-50 Maoists appeared at petitioner's home. [AR 121]. They broke into the furniture factory, demanded a gun, and ultimately beat the petitioner. [AR 141]. Three hours after the incident, the petitioner learned that another Maoist group entered their village. The petitioner and some of his friends went into hiding. [AR 142]. The petitioner later learned that the Maoists went to his home and abused his wife. [AR 142]. The Maoists also stated that they would kidnap the petitioner the next time they saw him. [AR 142].

The petitioner went to the police and reported the incident. However, the police arrested him stating they heard from villagers that he had voluntarily relinquished his gun to the Maoists. [AR 143]. These villagers were apparently in a land dispute with the petitioner's family. [AR 144]. The petitioner was detained for two weeks, beaten with bamboo sticks, and accused of supporting Maoist terrorist. [AR 144]. He was released after his father obtained help from an elected official. [AR 144].

After his release, the petitioner went to live with his uncle who resided in a far off village. [AR 146]. While he was living with his uncle, the Maoists came

to his home again looking for him. They also tried to kidnap his wife. [AR 147]. The police also came to his home and arrested his father and wife. Speaking to the father, the police accused the petitioner of supporting the Maoists. They also physically abused petitioner's wife. [AR 149].

The petitioner then went to Katmandu in March 1999 to live with his brother. [AR 151]. He then procured a visa and came to the United States. [AR 151]. While in the United States he learned that a warrant had been issued for his arrest in Nepal. [AR 151]. The warrant was apparently issued in May 2000. [AR 151]. He also testified that while his father and mother lived in Katmandu, his father would move around in order to avoid detection from the Maoists. [AR 154].

The petitioner entered the United States on June 4, 1999. [AR 95]. He came to the U.S. on a B1 visa. [AR 95]. He later changed his status to an F1 student visa because he began attending classes at Santa Ana Community College. [AR 95]. However, he ceased his studies on December 2001 because he was no longer receiving money from home to support himself and his wife who subsequently joined him in the U.S. before that date. [AR 97-99]. Petitioner also began working part time on campus. He also consulted a foreign students' office who told him to leave the country and return on a new valid student visa. [AR 97-99]. However, the petitioner chose not to leave the U.S. because his family informed him the political situation in Nepal was still poor. [AR 97-98]. Also, since the petitioner only had about one and a half

years of school remaining, he intended to return to school when he could financially support himself. The petitioner continued to have money problems throughout 2002, but decided in November 2002, based on the conditions in Nepal, that he could not return to his home country. As a result, based on a referral from a friend, the petitioner visited a lawyer in November 2002 to discuss his immigration status. [AR 113]. It was at this time that he learned he might be eligible for asylum based on his experiences in Nepal. His asylum application was filed on December 23, 2002. [AR 48].

On the basis of the foregoing facts, petitioner respectfully requests that the Court review this matter, and remand his case back for further consideration of his applications for relief under INA §§ 208(a) and 241(b), as well as his alternative request for protection under CAT.

4. ARGUMENT

A. STANDARD OF REVIEW

Questions of law and statutory construction are reviewed de novo. *INS v. Aguirre-Aguirre,* 526 U.S. 415, 424-25 (1999); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Factual findings underlying the denial of an asylum claim including findings regarding lack of credibility are reviewed for substantial evidence. *Mejia-Paiz v. INS* 111 F. 3d 720 (9th Cir. 1997); *Gui v INS*, 280 F.3d 1217, 1225 (9th Cir. 2002). See also *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (holding that the decision

below can be reversed "if no reasonable fact-finder could have failed to find the past persecution or fear of future persecution necessary to sustain the petitioner's burden.").

B. WITHHOLDING OF REMOVAL IS MANDATORY WHERE THE ALIEN'S LIFE OF FREEDOM WOULD BE THREATENED

Section 241(b) of the INA prohibits the Attorney General (AG) from removing an alien to a country where "such alien's life of freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b). Withholding of removal is not a discretionary form of relief. The Attorney General is required to grant withholding of removal, should he or she find that the alien meets the above stated requirements. Id.; *INS v. Stevic*, 104 S.Ct. 2489, 2496 n.15(1984).

In order to demonstrate eligibility for withholding of removal, the alien must demonstrate a clear probability of such persecution were he or she to be removed. That is, the alien must establish that persecution on one or more of the enumerated grounds is more likely than not to occur. *Stevic*, 467 U.S. 407; 104 S.Ct. 2489. Furthermore, general information concerning oppressive conditions is relevant to support specific information relating to an individual's well-founded fear of persecution. A specific threat directed against an individual is sufficient to trigger a withholding claim under the stricter "clear probability" of persecution standard even though the threat reflects a general level of violence in the country. *Bolanos-*

Hernandez v. INS, 767 F.2d 1277, 1284 (9th Cir. 1984).

C. THE PRESUMPTION IS THAT PRADHAN WILL SUFFER FUTURE PERSECUTION.

Evidence of past persecution creates the presumption that future persecution will occur. A finding of past persecution gives rise to a presumption that the applicant's life or freedom would be threatened for purposes of withholding of removal under INA section 241(b)(3). (8 CFR sections 208.16(b)(1)(I) and 1208.16(b)(1)(I); *Makadji v. Gonzales*, 470 F.3d 450, 458-59 (2nd Cir. 2006) [IJ reversed where citizen of Mauritania established past persecution and burden was not shifted to the government] ; *Ali v. Ashcroft*, 394 F/.3d 780, 791 (9th Cir. 2005) [where Somali clan member was gang raped by another clan, a finding of past persecution gave rise to the presumption of withholding of removal]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 460.)

The evidence of past persecution is not in dispute. "The IJ found that Pradhan had been persecuted by Nepalese police and Maoist terrorists in Nepal in the past." (Decision, p. a-4.) This created the presumption of future persecution.

Once evidence sufficient to show that it is more likely than not that past persecution occurred, the burden switched to the government to prove that matters have changed for the better. The government must bring affirmative evidence that the change has occurred.

It is the burden of the government to prove by a preponderance of evidence that the applicant could reasonably relocate. (*Ruiz v. Gonzalez* 479 F.3d 762, 767 (11th Cir. 2007) [ICE failed to establish by a preponderance of evidence that the applicant could reasonably relocate within Columbia; *Singh v. Ilchert* 69 F.3d 375, 379-381 (9th Cir. 1995); *Gambashidze v. Ashcroft* 381 F.3d 187, 192-94 (3rd Cir. 2004) [government must prove that relocation would be successful and reasonable]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 462.) At best, the government has some evidence – not even a preponderance of evidence – that Mr. Pradhan might be safe in Katmandu if he bribes the Maoists enough.

D. THE FINDING THAT PRADHAN'S FATHER LIVES UNMOLESTED IN KATMANDU AFTER GIVING THE MAOIST TERRORISTS A 50,000 RUPIE BRIBE ONLY INDICATES THAT PRADHAN WILL HAVE TO BRIBE THE MAOISTS AS WELL. THIS IS NOT EVIDENCE OF A SAFE RELOCATION LOCATION.

Mr. Pradhan's father gave a 50,000 Rupie bribe to the Maoists terrorists to avoid persecution in November 1998. [AR 138.] The giving of bribes to avoid persecution is evidence that the persecution would occur but for the bribe. Courts have uniformly rejected the very proposition that the Ninth Circuit has impliedly adopted (i.e., that Mr. Pradhan could avoid the persecution with a bribe just like his father did so relocation would be safe).

> "The Seventh Circuit has expressly held in a number of cases that suggesting that someone could use bribery to escape

> persecution is an 'irrational and altogether improper consideration in deciding a claim for asylum or other relief.' *Bosede v. Mukasey* 512 F.3d 946, 951 (7th Cir. 2008) [court was 'appalled that the IJ would rest its decision on the absurd proposition that Bosede could evade imprisonment, mistreatment, and possible death by approaching his jailers and trying to buy his way out']." (I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 589 [Bribery of Government Officials to Avoid Persecution].)

The fact that Pradhan's father and family is no longer persecuted by the Maoist terrorists after giving a 50,000 rupie bribe just indicates that Pradhan would have to do the same. It does not indicate that Katmandu is a safe relocation location.

D. MAOIST TERRORISTS OPERATE IN THE ALLEGED SAFE RELOCATION LOCATION–KATMANDU

Maoists operate in Katmandu. (*Arboleda v. U.S. Attorney General,* 434 F.3D 1220 (11th Cir. 2006) [where government conceded past persecution, its submission of a 1997 Asylum Profile and 1999 and 2000 DOS reports on Columbia did not establish that respondent could relocate to avoid the FARC which the court stated operates country-wide in Columbia]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 468.) Where a persecuting group operates throughout the country is cannot be assumed that any

place is safe.

E. OBTAINING A REPLACEMENT PASSPORT IS NOT EVIDENCE OF A REDUCED LIKELIHOOD OF FUTURE PERSECUTION.

The IJ, the BIA and the Ninth Circuit it improperly uses the fact that a replacement passport was obtained as evidence of a lack of likelihood of persecution. (*Mema v. Gonzales*, 474 F.3d 412, 419 (7th Cir. 2007) [ability to obtain passport by Albanian is not probative of fear of future prosecution because "governments are often all too happy to see undesirables and dissidents depart"]; *Perkovic v. INS*, 33 F.3d 615, 623, n.7 (6th Cir. 1994) [persecution is not inconsistent with legally obtaining a passport]; *Hoxta v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) [rejecting government's arguments that fear of persecution of Albanian in Serbia was belied by ease of applicant in obtaining a passport because Serbs wanted Albanians to leave]; I. Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 579.) Obtaining a replacement passport is not probative toward proving that Pradhan is not likely to be persecuted.

F. PASSAGE OF TIME IS NOT EVIDENCE OF LACK OF LIKELIHOOD OF FUTURE PERSECUTION.

Passage of time is not evidence of lack of likelihood of future persecution. (*Salazar - Paucar v. INS*, 281 F.3d 1069, 1076 - 77 [neither the passage of time because the case was pending at the BIA for six years, nor a 1993 Amnesty Report was sufficient to demonstrate changed circumstances in Peru]; I.

Kurzban *Immigration Law Sourcebook* (11th ed. 2008) p. 463.)

G. PETITIONER QUALIFIES FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE ACT.

Pursuant to Article 3 of the U.N. Convention Against Torture And Other Cruel Inhuman or Degrading Treatment or Punishment, it is the policy of the United Nations that "no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her for a third person, or for any reason based on discrimination of any kind." 8 C.F.R. § 208.18.

The burden of proof standard applied to CAT claims is the same as that applied in withholding of removal claims under INA § 241(b)(3). In order to demonstrate eligibility for withholding of removal under the CAT Act, the petitioner must prove that he or she is "more likely than not" to be subject to torture upon removal. This standard allows a petitioner to prove his claim by his own testimony, if credible, without corroboration. 8 C.F.R. § 208.16(C)(2); *Matter of J-E-*, 23 I&N Dec. 291, 302 (BIA 2002).

The facts support a finding that petitioner would, more likely than not, be tortured again if he were to return to Nepal today. Thus, the IJ was compelled to withhold the removal of this petitioner. The IJ"s failure to grant petitioner relief under CAT was error, which he now requests the Court to reverse.

5. CONCLUSION.

The government's burden of showing that it is more likely than not that Pradhan will not suffer future persecution if he is sent to Katmandu is not supported by substantial evidence. Each fact pointed to by the IJ, the BIA and the Ninth Circuit (i.e., that Pradhan's father and family have not suffered persecution since the father and family relocated to Katmandu and that Pradhan was able to obtain a replacement passport) are, by themselves not probative of changed circumstances. When the ignored facts that the Maioists operate in Katmandu and that Pradhan';s father had to bribe the Maoists to stop the persecution are considered, the presumption that Pradhan will suffer future persecution if he goes to Katmandu remains unrebutted.

Withholding of Removal should have been granted. Relief under the Convention Against Torture should have been granted.

Date: Feb. 5, 2010

Respectfully Submitted
Lee Harwell, Jr.
Law Office of Lee Harwell, Jr.
3424 Carson Street, Suite 320
Torrance, CA 90503
Telephone: (310) 542-9710

Facsimile: (310) 542-9850
Email: leehar@earthlink.net
Counsel for Petitioner,
Dhruba Pradhan

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U.S. COURT OF APPEALS

DHRUBA PRADHAN, Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General, Respondent.

No. 05-74039
Agency No. A096-160-953

MEMORANDUM

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted November 5, 2009 **
San Francisco, California

Before: GOODWIN and W. FLETCHER, Circuit Judges, and MILLS,*** Senior District Judge

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R 36-3

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

Dihruba Pradhan, a native and citizen of Nepal, petitions for review of the Board of Immigration Appeals' ("BIA") affirmance of the immigration judge's ("IJ") decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We hold that the BIA's decision is supported by substantial evidence and deny the petition for review.

We review for substantial evidence the decision determining whether an alien has established eligibility for asylum or withholding of removal. *Malkandi v. Holder*, 576 F.3d 906, 912 (9th Cir. 2009). We have jurisdiction to review the BIA's denial of withholding of removal under 8 U.S.C. § 1252(a)(1).

We reject the government's contention that we lack jurisdiction to review the BIA's denial of Pradhan's asylum request under 8 U.S.C. § 1158(a)(3). Under 8 U.S.C. § 1158(a)(2)(B), an alien seeking asylum must file an application within one year of arrival in the United States, unless one of two statutory exceptions applies. *See* 8 U.S.C. § 1158(a)(2)(D) (late applications may be considered "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application"). The alien must also demonstrate that the application for asylum was filed within a reasonable amount of time after the changed or extraordinary circumstances. *See* 8 C.F.R. §§ 208.4(a)(4)(ii), 208.4(a)(5)(iv). Although 8 U.S.C. §

1158(a)(3) bars review of determinations related to the one-year time bar for filing an asylum claim and its exceptions, the REAL ID Act of 2005 "restores our jurisdiction over 'constitutional claims or questions of law.'" *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007) (quoting *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005)). We held in *Ramadan* that this jurisdiction extends to mixed questions of law and fact, including the "changed circumstances" question under § 1158(a)(2)(D).

Pradhan entered the United States on a B1 visa in 1999. He changed his status to an F1 student visa, but then ceased his studies in December 2001. He was therefore out of status as of the end of December 2001. His asylum application was not filed until December 23, 2002. Pradhan does not dispute that he did not file for asylum within one year of entry, but contends that his untimely asylum application should be excused because of "changed country conditions." *See* 8 C.F.R. § 208.4(a)(4).

The IJ denied Pradhan's asylum application on the ground that Pradhan failed to establish exceptional circumstances for filing his application after one year of entry into the Unites States. The IJ also found that even if Pradhan had demonstrated changed country conditions, he had not demonstrated that he had applied for asylum within a reasonable period of time after he fell out of status and the changed country conditions were known to him. The BIA adopted and affirmed the IJ's decision. These findings are supported by substantial evidence.

Pradhan claims that it was not until

November 2002 that he learned of changed country conditions. The record does not support his contention. Pradhan fell out of status in December 2001. Throughout the following year Pradhan's family kept him informed about the political climate in Nepal. Yet it was not until November 2002, almost a year later, that he consulted an attorney to pursue his asylum claim. Pradhan testified that his reasons for waiting were that he was "waiting for money to come" and "also thought maybe things will change." Under these circumstances, the IJ properly concluded that Pradhan had not shown changed or extraordinary circumstances justifying his later application, and that one year between falling out of status and filing his asylum application was not a reasonable period.

To demonstrate eligibility for withholding of removal, Pradhan had to prove it is "more likely than not" that his life or freedom would be threatened in Nepal because of his "race, religion, nationality, membership in a particular social group, or political opinion." *See Al-Harbi v. I.N.S.*, 242 F.3d 882, 888 (9th Cir. 2001); 8 U.S.C. § 1231(b)(3). To receive protection under CAT, Pradhan had to demonstrate that "it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005); 8 C.F.R. § 208.16(c)(2).

The IJ found that Pradhan had been persecuted by Nepalese police and Maoist terrorists in Nepal in the past. However, the IJ determined (1) that changes in his family's situation in Nepal demonstrated that Pradhan's life or freedom would no longer be threatened, and (2) that Pradhan could

avoid a future threat to his life or freedom by relocating to Kathmandu with the rest of his family. The BIA agreed. Both of these findings are supported by substantial evidence.

First, Pradhan was unable to produce evidence to corroborate his testimony that the Nepalese police have an ongoing interest in him. No member of his family had been arrested or harmed since Pradhan left Nepal. Further, the same government officials that had persecuted Pradhan in the past wrote a letter stating the government was concerned for the safety of Pradhan and his family, and Pradhan obtained a replacement Nepalese passport in 2002 without incident.

Second, the BIA and IJ noted that Pradhan's family had relocated to Kathmandu and has not had any problems with the Maoists since Pradhan left in 1999. The IJ determined that there was not a "real likelihood or clear probability that the Maoists are interested in the respondent" because they have not had any contact with Pradhan or his family "for a number of years." Thus, Pradhan could avoid future persecution by joining his family in Kathmandu, where his family is currently living with incident. Under these circumstances, Pradhan did not show that he was likely to face a threat to his life or freedom or would be tortured if removed.

PETITION DENIED.

Supreme Court, U.S.
FILED

No. 09-091251 FEB 8 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DHRUBA PRADHAN,

Petitioner,

vs.

ERIC H. HOLDER, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

LEE HARWELL, JR.
LAW OFFICE OF LEE HARWELL, JR.
3424 Carson Street, Suite 320
Torrance, California 90503
Telephone: (310) 542-9710
Facsimile: (310) 542-9850
Email: leehar@earthlink.net

Counsel for Petitioner Dhruba Pradhan

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U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A96 160 953 – San Francisco Date: JUN 27, 2005

In re: DHRUBA PRADHAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENTS: Earle A. Sylva, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. We adopt and affirm the February 10, 2004, decision of the Immigration Judge to the extent she denied the respondent's claim for asylum on the basis of his failure to provide clear and convincing evidence that his application for asylum was timely filed and that he failed to establish that he was eligible for one of the enumerated exceptions to the time bar. We further adopt and affirm the Immigration Judge's decision in which she denied the respondent's application for withholding of removal under section 241(b)(3) of the Immigration and

Nationality Act, 8 U.S.C. § 1231(b)(3). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We agree that the respondent has failed to carry his burden of proof with respect to establishing that it would be more likely than not that he would be persecuted on account of a protected ground or that he will be tortured upon return to Nepal. In this regard, the respondent failed to provide any objective corroborating evidence to establish the mistreatment by the police and while he asserted that a warrant had been issued for his arrest, there was confusion surrounding the date the warrant was issued and further, the warrant was not available as his father apparently lost it. There was no additional evidence of record to establish that the police have any ongoing interest in the respondent. With regard to the Maoist guerrillas, the respondents' parents moved to Kathmandu where his brother lives and operates a business and there is no evidence that either his parents or his brother have had any difficulty with the Maoists since his departure from Nepal in 1999.

Accordingly, in view of the above, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge

and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS, formerly the Immigration and Naturalization Service). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File A 96 160 953 February 10, 2004

In the Matter of

DHRUBA PRADHAN,) IN REMOVAL
) PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act – overstay nonimmigrant.

APPLICATIONS: Section 208 of the Immigration and Nationality Act – asylum.

Section 241(b)(3) of the Immigration and Nationality Act – restriction on removal.

8 CFR Section 208.13(c)(1) – protection under the Torture Convention.

Section 240B(b)(1) of the Immigration and Nationality Act – voluntary departure at the end of proceedings.

ON BEHALF OF RESPONDENT:

Tsz-Hai Huang, Esquire
Rai and Associates, P.C.
220 Montgomery Street, Suite 1000
San Francisco, California 94104

ON BEHALF OF THE OFFICE OF CHIEF COUNSEL:

Katherine F. Zill, Esquire
Assistant Chief Counsel
San Francisco, California 94108

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 23-year-old married male, native and citizen of Nepal. He was admitted to the United States on a nonimmigrant visitor visa as a B1, according to the charge, at or near Los Angeles, California on or about June 4, 1999. The respondent was allowed to remain for a period not to exceed December 31st, 2001, and, ~~he~~ has remained without further authorization.

The respondent was served with the Notice to Appear dated January 29th, 2003 (Exhibit 1), in which he has admitted all four factual allegations, and conceded ~~that~~ he is removable as charged. Based upon his admissions and concessions, removability has been established by clear and convincing evidence.

Because the respondent declined to designate a country to which he should be removed, the Court pursuant to Section 241(b)(1)(C) of the Immigration and Nationality Act (hereinafter referred to as the Act) designated Nepal, should such action become necessary.

As relief from removal, the respondent submitted an application for political asylum pursuant to Section 208 of the Act (Exhibit 2), which is also considered an

application for restriction on removal to a country where an alien's life or freedom would be threatened pursuant to Section 241(b)(3).

For asylum applications filed on or after April 1st, 1997, an applicant also shall be considered for eligibility for withholding of removal under the United Nations Convention Against Torture and other forms of cruel, inhuman, or degrading treatment or punishment (Torture Convention) if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. *See* 8 C.F.R. Section 208.13(c)(1).

In the normal course of business when an applicant files an affirmative application with the Asylum Office, as the respondent did here, a copy is forwarded to the Department of State for an advisory opinion. There is no indication that any individualized opinion was issued by the Bureau of Democracy Human Rights and Labor. At the master calendar hearing, both respondent and counsel waived any further individualized request for a Department of State opinion.

Instead, the background documentation has been taken into the record regarding Nepal. Respondent submitted what is contained in the record at Exhibit 8, and the Government presented the Country Reports on Human Rights Practices for 2002 at Exhibit 15, and a Nepalese time line for 2001 through 2003 at Exhibit 14. There is also an additional package of documentation filed by the respondent at Exhibit 11.

None of those specifically refer to the respondent or to any member of his family, but have been considered for general background purposes.

The respondent has several identification documents. The first is a passport issued to him out of the Washington office of the Nepalese consulate (Exhibit 3). This was issued in 2002. He also has presented a marriage certificate with translation (Exhibit 6), and a school certificate (Exhibit 4). He has also provided a Nepalese citizenship card with translation at Exhibit 5. Exhibit 5 was not authenticated by the Forensic document laboratory, so the Court is relying mostly upon the passport issued by the Nepalese government to establish the respondent's identity.

The respondent has applied for asylum, which is problematic because he entered the United States in 1999, and was allowed to remain for a period on his visitor visa. According to what is contained in the record at Exhibit 13, the respondent was issued an I-94 showing that he had changed his nonimmigrant status to that of an F1 ~~and he was given validity~~ [valid] for duration of status. The date on this is a WAC99 number so apparently it was properly issued in 1999 while he was still in nonimmigrant status.

However, according to the respondent's own testimony, he attended school as an F1 student, and then ceased his studies in December of 2001. He indicated ~~that~~ the reason he had to do that was because he was no longer receiving money or sufficient funds from home to support himself and his wife who had joined

him here before that date. He also was working part time on campus, but as of December of 2001, he was no longer in full time nonimmigrant status. He said ~~that~~ he consulted with the foreign students' office and was told ~~that~~ he could leave the country and return on a new valid student visa, but he chose not to leave because of information he received from his family. Instead, he filed his application for political asylum with the Asylum Office, ~~and it~~ [which] is dated December 23rd, 2002.

The Asylum Officer interviewed the respondent~~;~~ ~~and~~[.] c[C]ounsel for the respondent has presented the assessment to refer (Exhibit 17). This indicates that the respondent's case was referred to the Court because he had failed to overcome the one year bar to timely filing. Although the Asylum Officer found that the respondent continued to be in lawful nonimmigrant status until the end of 2001, once he no longer attended classes during the entire year of 2002, he failed to maintain his F1 status~~, and~~[.] t[T]herefore[, he] lost his status as of the date ~~when~~ he ceased his studies. The question then was whether there were changed country conditions or exceptional circumstances which prevented him from filing in a timely fashion.

The Court has looked to 8 C.F.R. Section 208.4(a)(4) with regard to changed circumstances. They include, but are not limited to: (A) changes in conditions in the applicant's country of nationality or last habitual residence; (B) changes in the applicant's circumstances that materially effect his eligibility for

asylum including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of fear of persecution that might place him at risk. If either of those are found, then it is incumbent upon the respondent to establish that he filed his asylum application within a reasonable period given those "changed circumstances."

The Court has evaluated his testimony also and determined that although the respondent stated ~~that~~ the conditions became worse in his country, there is nothing to indicate ~~that~~ it was a reasonable period of time given any change circumstances during which he was eligible and did file his application for asylum. It is clear that the respondent fell out of status as of December 200~~1~~[2], and did not file his application for asylum until one year later. That is not a reasonable period given any changed circumstances.

With regard to the other category under 8 C.F.R. Section 208.4(a)(5), which is entitled "extraordinary circumstances," the Court finds ~~no applicable section either~~ [this inapplicable]. The respondent claimed to have no serious illness or mental or physical disability which prevented him from timely filing. Also, he did not have an apparent legal disability, nor can he claim ineffective assistance of counsel since he was unaware ~~that~~ he even had the opportunity to file for asylum until he spoke to a neighbor of his who told him about ~~that and~~ [it.] ~~t~~[T]hen [he] contacted the law office which have represented him in these proceedings. Therefore, the respondent has failed to establish ~~that~~ there were extraordinary circumstances.

For those reasons, the Court pretermitted his application for political asylum, and only is permitting him to seek relief under restriction from removal pursuant to Section 241(b)(3), and protection under the Torture Convention.

To be eligible for protection under Section 241(b)(3), the respondent must establish that there is a real likelihood or clear probability that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1994).

The respondent bears the burden of proof that it is more likely than not ~~or~~ that there is a real likelihood or clear probability ~~that~~ he will be persecuted in the future. He has claimed to have suffered persecution at the hands of two individual parties in Nepal. He testified ~~that~~ he and his family members have been threatened and accosted, as well as having their personal property destroyed by Maoists terrorists. He testified ~~that~~ he and his family were first aware that Maoists were using a farm house on the coffee plantation as staging area. They attacked the family four times during the time ~~that~~ the respondent was in Nepal. He also testified that the Maoists destroyed the furniture factory owned by the family in approximately 1999, and there is a newspaper article which has not been authenticated indicating that the home of Durga Prasad Pradhan was dismantled by the Maoists due to the blasting of four bombs, damaging the house to almost total destruction. See Exhibit 10.

This newspaper entitled the Galaxy was sent forward to the Forensics laboratory for examination. See Exhibit 16. The Forensic document examiner Joan DiMartino stated in the December 3rd, 2003, response that there was no information on file which ~~would lead to be able~~ [can be used] to authenticate this particular newspaper or ~~in fact~~ the other document which is a letter from the ~~minister of home fears~~ [District Officer] in Nepalese and in English. See Exhibit 9. Therefore, the ~~document itself as to its~~ [document's] authenticity has not been established. The letter does go on to state that the examination revealed no physical evidence of alteration or other physical evidence that would assist in determining the authenticity of the exhibits. However, there were no unexpected production similarities.

The respondent's fear of the Maoists continues to today because of the fact that they have been declared a terrorist group which is not able to be controlled by the Nepalese government. This is referred to in some of the background documentation used by the Asylum Officer in the assessment to refer. See Exhibit 17.

The respondent's mother and father have now left the village area where they lived previously, and where ~~the~~ [their] house was destroyed. They reside in Kathmandu ~~and~~[.] ~~t~~[T]here[, they] have not had any direct or indirect contact with Maoists since they have taken up residence ~~there~~. Although the respondent testified that they move around, it appears ~~that~~ from his additional testimony, they primarily live

wit[h] the respondent's brother who has a business and also has not had any direct contact with Maoists in Kathmandu in the last several years.

The second part of respondent's claim for fear of returning to Nepal is due to having been arrested by the police on two separate occasions. He said ~~that~~ his first arrest occurred in October of 1998 after the Maoists had been discovered on the family farm. The respondent, his father and brother were ~~all~~ arrested and taken to the police station. The brother who was residing primarily in Kathmandu and had a business there was released after four to five hours ~~and questioned~~ [of questioning], and the father and respondent were held for two days. During that time, he said ~~that~~ they were confined in separate cells and ~~they~~ were beaten with hands, kicked and boots were used against them. They were released finally with a warning not to support the Maoists and they claim ~~that~~ they never did.

The respondent testified that his father had actually gone to the police three times in Tamghas to report that Maoists had taken over the farm house and ~~that~~ they did not have the family permission to be there. However, the police did not take any interest in this until such time as the alleged arrest took place in October 1998.

The respondent testified ~~that~~ he was arrested the second time on or about January 5th or 6th of 1999. This time the Maoists had broken into the family furniture factory and destroyed it. They demanded

the gun ~~that~~ the family ~~had~~ had for approximately 15 years. The respondent refused and he was beaten quite a bit, as was his father. Following that incident, about three hours later, they heard that another Maoists group was entering the village and so the father advised the respondent to go into hiding, which he did with four other friends. The Maoists came and gave problems to the wife and the family, and misbehaved with her saying nasty things and manhandling her. Later, after this, the respondent with two friends went to the Tamghas police station and reported this incident to the police. Instead of the police taking action against the Maoists, they arrested the respondent and put him in jail because he was charged with having voluntarily given a gun to the Maoists. Apparently there was information provided by other members of the village who reported this incident, and the respondent described them as family enemies due to land disputes.

The [respondent] was the only member of his family who was arrested on that occasion~~, and~~[.] ~~h~~[H]e said he was held for two weeks and charged as a Maoists supporter. During the time he was held, he was beaten with bamboo sticks and kicked with boots and put on the floor. His legs were tied together and he was beaten every day. Finally after two weeks, he was released when his father used influence and [an] elected official from Guelmi intervened on his behalf.

The respondent was then encouraged by his family, including his father and wife, to go into hiding at his uncle's home, ~~which was~~ approximately six hours

walking. After thinking about running away to India, his father suggested that he join his brother in Kathmandu~~, and~~[.] ~~h~~[H]e left for there and stayed for approximately a month or so and then got a visa to Hong Kong where he remained for four to five months, obtaining a visitor visa from the American consulate in Hong Kong to come to the United States. His wife joined him in Hong Kong and she stayed there for some time with her mother and then joined him here in the United States.

The wife of the respondent has had some incidents to which she could testify, but she has not been presented here since she is undocumented now and has not filed for political asylum.

This is a troubling case because if the standard was such that the respondent was eligible for asylum, it would seem that the persecution that he had suffered at the hands of the police in the past would be sufficient to shift the burden to show that country conditions had changed to such an extent that he would not have at least a well-founded fear of future persecution from the police.

However, in the course of the respondent's time in the United States, he stated ~~that~~ an arrest warrant had been issued to him, which is not part of the record. There ~~was~~ [were] some discrepancies as to when the arrest warrant was actually issued. That is May ~~of~~ 2000 versus May ~~of~~ 2002. The arrest warrant was requested to be sent by his father to him here in the United States, but according to his testimony, it is

no longer available because the father has lost it. Therefore, there is no way to know whether this arrest warrant ever actually was issued or for what it may have been issued.

Additionally, the respondent has applied for a replacement passport in the United States, ~~and this~~ [which] was issued by the Nepalese government out of Washington, D.C. after he presented documentation as to his identity, his birth certificate, his place and date of birth, as well as his residence as listed on his passport. He gave the actual location where the family had been living in the village, rather than his address in Kathmandu. This leads the Court to believe that if anyone was interested from a police standpoint of view in the respondent, ~~that that~~ [it] may have been problematic ~~in~~ [when] issuing a new travel document to him so ~~that~~ he could return to his home country.

There is no way of knowing whether the police ~~are~~ continue[ing] to be interested in the respondent or for what purpose. However, it is clear that his testimony stated that neither his father nor his mother nor his brother have been arrested by the police subsequent to his departure from Nepal in 1999.

With regard to his fear of the Maoists in Nepal, it appears that all of the difficulties with them occurred in the country side when they were attempting to have places to hide or demanding money from family members to support their cause. There has been no evidence established that the family has ever had any

direct or even indirect contact with the Maoists in Kathmandu. The father, mother and brother continue to reside there. The brother has an ongoing business with partners, and there is no indication that the Maoists are interested in any members of his family including the respondent.

Since the burden of proof is ~~that there is~~ a real likelihood or clear probability that the respondent would be persecuted on account of his imputed political opinion, as far as the police are concerned, that he may have supported or helped the Maoists or because of whatever reason by the Maoists who appear to have wanted money and a place to hide, the respondent has failed in his burden for the reasons so stated. There is no independent evidence ~~that~~ the police are interested in the respondent now or that they ~~have even~~ [had] an interest in him [for any of the protected five grounds] since they took him into custody for investigation and mistreated him in the manner ~~in which~~ he has described.

As far as a real likelihood or clear probability that the Maoists are interested in the respondent, that definitely has not been ~~made~~ [established] since there has been no contact with any Maoists by any member of the family for a number of years.

The fact that the family home was bombed~~, it does not indicate that they are has been~~ [does not establish] any significant interest against the family because of their political opinion or otherwise. It is a place that was left vacant with no one living there~~,~~[.]

~~t~~[T]herefore[,] there is no indication why this may have occurred on account of any one of the protected five grounds.

The respondent has failed in his burden to establish that it is more likely than not that he would be persecuted in the future. Therefore, the question then is whether there is a present fear of torture and ~~that~~ torture would be by or instigated by or with the consent or acquiescence of a public official or a person acting in an official capacity. As already indicated, the respondent may have a subjective fear based upon the description of the past actions ~~that~~ [which] occurred. However, it does not establish that it is more likely than not that this present fear of torture would be reasonable[y] based upon the situation ~~that has presented to~~ [of] the family members in the most recent past.

The respondent is otherwise eligible for voluntary departure, and providing he post[s] a bond in the amount of $500 with the Department of Homeland Security within the next five business days, the Court would grant him voluntary departure in the exercise of discretion. Accordingly, the order is as follows:

ORDER

IT IS HEREBY ORDERED that the application for political asylum is pretermitted for the failure to establish that the respondent filed within a reasonable period of time after the violation of his nonimmigrant status.

IT IS FURTHER ORDERED that the respondent's application for restriction on removal to a country where an alien's life or freedom would be threatened is denied.

IT IS FURTHER ORDERED that the respondent's application for protection under the Torture Convention is denied.

IT IS FURTHER ORDERED that the respondent be allowed to voluntarily leave the United States providing he post[s] a bond in the amount of $500 and the ultimate date of voluntary departure would be April 10th, 2004.

IT IS FURTHER ORDERED that if the respondent does not depart when and as required, or fails to post the bond within the period of time required, this order will automatically convert to one of removal without further notice or proceedings, and the following order shall thereupon become immediately effective: respondent shall be removed from the United States to Nepal on the charge contained in the Notice to Appear.

/s/ Bette Kane Stockton
BETTE KANE STOCKTON
Immigration Judge

IMMIGRATION COURT
550 KEARNEY ST., SUITE 800
SAN FRANCISCO, CA 94108

In the Matter of

Dhruba PRADHAN — Case No.: A96160 953
Respondent

IN REMOVAL PROCEEDINGS
ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 2/10/04. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ or in the alternative to _____.

[x] Respondent's application for voluntary departure was granted until April 10, 2004 upon posting a bond in the amount of $500.00 with an alternative order of removal to Nepal.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn (x) ~~other~~. [pretermitted due to 1 year bar]

[x] Respondent's application for withholding of removal was ( ) granted (x) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application for a adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246 of the INA.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[x] Other: CAT relief was denied
Appeal ~~Waived~~ Reserved: A ~~/ I / B~~
Appeal due by: 3/11/04

/s/ Bette Kane Stockton
Bette Kane Stockton
Immigration Judge

Date: 2/10/04

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL [ ] PERSONAL SERVICE [X] ✓

TO: [ ] ALIEN [✓] ALIEN'S ATTY/REP [x] ~~DHS~~ [KFZ]

DATE: 2/10/04 BY: COURT STAFF BKS

ASSESSMENT TO REFER

ALIEN NUMBER:
A96 160 953

DATE:
January 29, 2003

NAME: Dhruba PRADHAN

[MT] ASYLUM OFFICER:
M. Temple ZSF 130

COUNTRY: Nepal

REVIEWING SAO:
C. Gadye ZSF 043

LOCATION: ZSF

The applicant is a 22-year-old male native of Nepal and citizen of Nepal, who entered the United States as a B1 on June 4, 1999 at Los Angeles.

The applicant fears harm by Maoists and Nepalese Police on account of his imputed political opinion (accused of opposing Maoists by the Maoists and supporting Maoists by the police).

Because the applicant's last arrival was on June 4, 1999, he had June 3, 2000 to timely file his application. This applicant instead filed on December 23, 2002. Clear and convincing evidence, including the applicant's testimony, demonstrates that he filed his application more than one year after his last arrival. However, applicant established extraordinary circumstances for filing more than one year after his date of arrival in the United States: he obtained F1 status in October 1999. According to his I-20, which bears an INS approval stamp, this status was valid through December 31, 2002.

Although applicant established that he obtained F1 status in October 1999, his testimony demonstrates

that he lost this status at the end of 2001: applicant stated that he stopped attending classes at the end of 2001 and did not attend any classes in 2002. As such, applicant failed to maintain his F1 status and is therefore considered to have lost this status on December 31, 2001. Clear and convincing evidence, including the applicant's testimony, demonstrates that he waited nearly one year from the date that he lost his F1 status before filing for asylum. This is not a reasonable period of time to delay filing, and, as such, applicant has not filed timely.

Applicant testified that Maoists began using a house belonging to his family for shelter in August 1998. Applicant said his father reported this to the Nepalese authorities. Applicant, his father, and his brother went to this house during the Dashain festival in 1998 and found policemen there. The policemen took the three to the local police station, where the police separated them and accused applicant's father of supporting the Maoists. Applicant said the police released his brother, but beat him and his father and detained them for two nights. Applicant's brother paid a bribe to obtain their release.

Applicant said that Maoists came to his village in November 1998. He added that five Maoists forced the door of his family's house and entered. Applicant's mother and wife cooked for them. The Maoists rested at the house overnight and took 50,000 rupees from his father.

Applicant stated that the Maoists came to his family's home again in December 1998. He also stated that the Maoists threatened to kill him if his father did not permit him to join the Maoists. The Maoists told applicant and his family that they would return and then left.

Applicant stated that 40 to 50 Maoists came to his village on January 5, 1999. The Maoists again returned to applicant's house. They demanded a gun they knew his family had had in its possession. Applicant indicated that he argued with the Maoists and was beaten as a result.

Applicant stated that he went to the police to file a complaint. The police, acting on information provided by people politically opposed to applicant's family, arrested applicant, demanded information about the Maoists, and beat him. Applicant stated that the police detained him for two weeks and beat him everyday of his detention.

Applicant noted that the Maoists appeared at his family's home while he was away and tried to take his wife to do chores for them. He stated that the Maoists swore to kill him. He added that police also came to his family's home while he was away and accused him of assisting anti-government forces in an attack on police at Tamghas. Applicant said the police took his wife and father, detained them briefly, and sexually harassed his wife.

Applicant decided he had to leave Nepal in order to escape the Maoists and police. He stated that he left

his wife in Hong Kong with her mother-in-law. His wife later joined him in the United States.

Applicant further stated that police came to his family's house in May 2000 and accused him of involvement in many Maoist incidents, although he was not even in Nepal.

Country conditions do not support that there are changed circumstances which materially affect the applicant's eligibility to apply for asylum. Current country conditions show the Maoists continue to fight a violent guerrilla war against the Nepalese Government, which has caused the Nepalese Army to intervene to help the beleaguered Nepalese Police. The BBC reported that the Maoists are active even in the capital, Kathmandu, and are responsible for several bombings ("Maoists kill 48 police in Nepal," *BBC News*, September 8, 2002 [Internet] http://news.bbc.co.uk/1/hi/world/south_asia/2243838.stm; "Eyewitness: Nepal's Bitter War," *BBC News*, May 11, 2002, [Internet] http://news.bbc.co.uk/1/hi/world/south_asia/1981549.stm; "Nepal woos tourists despite civil war," *BBC News*, May 20, 2002 [Internet] http://news.bbc.co.uk/1/hi/business/2013398.stm). Both the Australian Department of Foreign Affairs and Trade and the US State Department have warned their citizens of the unstable situation in Nepal and the possibility of violence, including bombings ("Travel Advice: Nepal," *Australian Department of Foreign Affairs and Trade*,

September 6, 2002, [Internet] http://www.dfat.gov.au/zw-cig/view/Advice/Nepal). The violence is not substantially dissimilar from that which took place in 1999, when applicant left Nepal (see bureau of Democracy, Human Rights, and Labor, "Nepal," *Country Reports on Human Rights Practices, 1999*, (State Department: 1999) [Internet] http://www.state.gov/g/drl/rls/hrrpt/1999/440.htm). As such, there are no changed circumstances in Nepal that materially affect the applicant's eligibility to apply for asylum.

The Service examined other possible changed circumstances, but the applicant was not eligible for them. Furthermore, the reason for the applicant's delay in filing for asylum does not constitute an extraordinary circumstance as provided for in INA Sec. 208(a)(2)(B), (D).

Because the applicant's I-589 was untimely filed and there are no changed or extraordinary circumstances which would result in the application being excepted from the filing deadline, the applicant is prohibited from filing for asylum and his application is referred under INA Sec. 208(a)(2)(B) & (D) and 8 C.F.R. Sec. 208.4(a).